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Supreme Court of the United States

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Motion to Dismiss and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

No. 155.

UNION MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

ELIZABETH KIRCHOFF,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS.

Now comes Elizabeth Kirchoff, the defendant in error, by George R. Daley, her solicitor, and moves the court to dismiss the writ of error herein, for want of jurisdiction, and further moves that in case the court shall find it has jurisdiction of the case, then that it affirm the judgment of the Supreme Court of the State of Illinois, because it is manifest the said writ of error was taken for delay only , and that the question on which the jurisdiction of the court depends is so frivolous as to not need further argument.

GEORGE R. DALEY,
Solicitor for Defendant in Error.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION.

This case was before this court at the October term 1895, upon a former writ of error to the Supreme Court of the State of Illinois, to review a judgment rendered by that court on June 12, 1890, which writ upon a hearing, was dismissed upon the ground that the judgment of the Supreme Court of the State of Illinois was not a final judgment.

Union Mutual Life Ins. Co. v. *Kirchoff*, 160 U. S., 374.

The decision of the Supreme Court of the State of Illinois, above referred to, affirmed the judgment of the Appellate Court of the First district of Illinois, which reversed and remanded the cause to the Circuit Court of Cook County, for the purpose of an accounting between the parties as prayed in the bill, and thereupon entering a decree in favor of defendant in error; and this court held that until such accounting was had the decree was not final.

After the decision of the Supreme Court of Illinois, to which the former writ of error was prosecuted, the accounting was had in the Circuit Court of Cook County and a final decree entered. The cause was appealed by the company to the Appellate Court of the First district, which affirmed the decree of the Circuit Court (51 Ill. App., 67), from which decision an appeal was again prosecuted to the Supreme Court of the state, which affirmed the judgment of the Appellate Court (149 Ill., 536). It is to reverse this last judgment of the State Supreme Court that this writ of error is prosecuted.

STATEMENT OF FACTS.

The facts are stated in the report of the case upon the hearing of the former writ of error. We quote same from that report as follows (160 U. S., 374):

"On May 8, 1871, Julius Kirchoff, being engaged in "the distillery business in Chicago, borrowed $60,000 "of the Union Mutual Life Insurance Company, and "to secure the payment thereof, executed together with "his wife, Elizabeth, and her mother, Angela Diversey, "a joint judgment note for $60,000 and a trust deed "covering certain real estate in Chicago, belonging to "Kirchoff and his wife, and certain other property, in- "cluding a farm in Cook County, owned by Mrs. Di- "versey. The money received from the loan was put "in the bank to the credit of the firm of Kirchoff Bros. "& Co., which soon after failed.

"In 1876, default having been made in the payment "of interest and taxes, judgment was taken against "Mrs. Diversey on the note after certain unsuccessful "negotiations towards funding the indebtedness into a "new loan at a lower rate of interest, and on July 11, "1878, proceedings were commenced in the Circuit "Court of the United States to foreclose the trust deed. "The bill in addition sought to cure a misdescrip- "tion of the property belonging to Mrs. Diversey, who "filed an answer denying the right of the company to "cure the misdescription and averring that the notes "and mortgage were procured from her by misrepre- "sentation.

"From this time the relation of the parties seems to

"have remained unchanged until June, 1879, when an "agreement was reached by which the company re- "leased to Mrs. Diversey its claim upon forty acres "of the land belonging to her, and she executed to it "a warranty deed for the remainder of the premises. "About the same time, Mrs. Kirchoff and her hus- "band executed a quitclaim deed of all the property "belonging to them and included in the mortgages. "The deed from Mrs. Diversey was immediately placed "on record, but the deed from the Kirchoffs was with- "held by the agent and attorney of the insurance com- "pany.

"It was claimed by Mrs. Kirchoff that during the ne- "gotiations which culminated in the execution of the "above deeds, it was agreed that the insurance com- "pany should reconvey to her two lots included in her "deed one of which was then occupied as a homestead, "the other cornering upon it, but facing the other way; "that the price at which the reconveyance should take "place was their valuation at a previous appraisement "made by one Rees, viz: $7,500 and $2,500, respectively, "and that Mrs. Kirchoff was to execute in payment "therefor her notes for $10,000, extending over a period "of ten years, bearing interest at six per cent., and "secured by a mortgage upon the two lots. It seems "there were certain intervening claims on one of the "lots, growing out of a sheriff's deed, executed pur- "suant to a sale on a judgment against Mrs. Kirchoff, "rendered subsequently to the original trust deed, "but prior to the deed from Kirchoff and wife to the "company, which rendered necessary a further prose- "cution of the foreclosure proceedings in order that the "company might obtain a good title to the premises so

"as to convey a clear title to Mrs. Kirchoff and take "from her a mortgage which would be a first lien "thereon. It is claimed that this matter was explained "to Mrs. Kirchoff. her husband and agent, and he was "assured that the prosecution of the foreclosure pro- "ceedings would not in any manner affect the agree- "ment which had been made, but that as soon as the "company got a deed from the master in chancery, it "would carry out its part of the contract, by conveying "to Mrs. Kirchoff the premises in question and would "then take the mortgage from her. She alleged that "relying upon this agreement, no defense was made to "the foreclosure proceedings, by her, and the same "were prosecuted to a decree, and the master's deed "issued thereon to the insurance company January 21, "1882. The object of the bill in this case was to insist "upon this right of redemption in accordance with its "terms.

"The insurance company on the other hand, con- "tended that an inspection of the record showed that "no such agreement was ever concluded and that the "state court was bound by the decree of the Federal "court foreclosing the mortgage, and had no jurisdic- "tion to review it. It was not disputed that proposi- "tions similar to the so-called agreement were dis- "cussed between the Kirchoffs and the agents of the "insurance company, or that assurances were given "by the latter of the probable willingness of the insur- "ance company to sell the land on the terms named; "but it is claimed that when the insurance company "was advised of the proposition, it was instantly and "unequivocally declined and this action of the com "pany communicated to Mrs. Kirchoff in time to pre-

"vent any injury to her from the quitclaim deed. "That, after having been thus fully advised, she elected "to deliver the deed, and in that manner get the benefit "of the release from her indebtedness.

"A demurrer was filed to the bill which was over- "ruled, when defendant answered, denying the agree- "ment for redemption set forth in the bill, and also set "ting up the statute of frauds as a defense. The case "coming on for hearing upon pleadings and proofs, the "bill was dismissed for want of equity. An appeal "was taken to the state Supreme Court which was dis- "missed upon the grounds that the case should have "gone to the Appellate Court. 128 Illinois, 199. Where- "upon the complainant sued out a writ of error from "the Appellate Court of the First district of Illinois to "the Circuit Court of Cook County and upon a hearing "in the Appellate Court the decree of the Circuit Court "was reversed, with directions to enter a decree in ac- "cordance with the opinion of the Appellate Court. 33 "Illinois App., 607. This opinion was not sent up "with the record in this case. From the decree of the "Appellate Court, the insurance company prosecuted "an appeal to the Supreme Court of the state, which "affirmed the decree of the Appellate Court. 133 Illi- "nois, 368. To reverse that decision, this writ of error "was sued out."

The foregoing is a statement of the case as it appeared to this court upon the former hearing. The complete record of the case is now before the court, and the decree which is sought to be reviewed, is unquestionably final.

During the prosecution of the foreclosure proceeding in the United States Circuit Court, a receiver was

appointed of all the property, and about nine months after the confirmation of the report of sale the receiver filed apetition in said cause stating that Julius Kirchoff was in possession of the premises in question and refused to pay rent therefor and asking for a writ of assistance to put him (the receiver) in possession. (Pr. Rec., 192.)

To a rule to show cause why such writ should not issue the husband of defendant in error filed an answer setting up the agreement in question as having been made between the company and himself and asking that the writ do not issue lest his rights be prejudiced. (Pr. Rec., 106.) The court nevertheless, issued the writ, and it may be contended that this decision by the court operated as a *res adjudicata* of the issues involved in this case and that the decree enforcing the claim of defendant in error does not give full faith and credit to this order of the United Sates Circuit Court.

The present record further discloses that in 1871 title to the premises in question was in appellee, Elizabeth Kirchoff. The distilling firm of Julius Kirchoff & Co. then occupied the premises for a distillery. They failed to pay certain revenue taxes and the United States seized the distillery and the ground upon which it was located and proceeded to dispose of same by statutory notice and sale, being itself the purchaser at that sale. The deed to the United States by the collector of internal revenue, was issued in 1882 and on September 10, 1884, after the matter had been called to the attention of the company by Kirchoff the United States by Walter Evans, Commissioner of Internal Revenue,

conveyed to the plaintiff in error all the right, title and interest of the United States in and to the said premises The defendant in error was not a member of the distilling firm of Kirchoff & Co., was not in any manner a party to the proceedings upon the seizure and had no notice thereof.

The plaintiff in error paid to the United States for its claim upon the premises the sum of $500 and in the accounting in this case was allowed that amount with interest. It may be claimed that the decree in this case was equivalent to a decision against the validity of the said deed from the commissioner of internal revenue and that for that reason this court has jurisdiction.

The state courts found that the contentions of the complainant were established by a preponderance of the evidence and decreed in her favor as prayed. The Supreme Court of Illinois stated the agreement as found by it to be as follows:

"It was a part of the arrangement under which the "complainant was to obtain the two lots in contro- "versy that a decree of foreclosure should be entered, "and that the premises should be sold under such de- "cree. The decree was rendered and the sale made by "consent for the purpose of clearing the different tracts "of land mentioned in the quitclaim deed from certain "encumbrances." * * *

"The substance of the agreement was that complain- "ant was to have the two lots in question, notwith- "standing her deed in September, 1879, and notwith- "standing the decree of foreclosue and sale there- "under, upon the payment of $1,000, and the execution

"of her notes secured by a mortgage on the premises "for the balance, payable $1,000 each year for nine "years, with six per cent. interest." (Pr. Rec., 311.)

We shall not discuss the evidence in the record as we understand that, according to the practice of this court, where the facts are found by the state court, such finding will be considered conclusive.

Egan v. *Hart*, 165 U. S., 188.

And the opinion of the state court will be considered part of the record and looked to to ascertain the questions presented and facts found.

Egan v. *Hart*, *supra*.

If this court has jurisdiction to review the judgment of the Supreme Court of the State of Illinois, it is by virtue of Sec. 709 of the Revised Statutes of the United States, which provides in substance that the final decree of a state Supreme Court may be re-examined by this court where any title, right, privilege or immunity is claimed under an authority exercised under the United States, and the decision is against such title, right, privilege or immunity specially set up or claimed under such authority. In support of the claim of jurisdiction only three possible contentions can be made:

1. That the courts of the State of Illinois decided against the title of the company derived under the decree of foreclosure in the United States Circuit Court, the master's sale and deed thereon.

2. That the decision reviews a matter which is *res adjudicata* by reason of the decision on the writ of assistance above referred to.

3. That the courts of the State of Illinois decided against the title of the company derived under the deed

from the commissioner of internal revenue above referred to.

We sh all consider these possible claims of jurisdiction in the order mentioned.

In order that a party may avail himself of the privileges of Sec. 709, he must present his claim to the state courts in apt time; and unless a Federal question is necessarily involved in the decision by the Illinois court then the plaintiff in error is not in a position to now claim the benefit of said Sec. 709, because nowhere in the record does it appear that the plaintiff in error set up such claim until after the case had been reversed by the Appellate Court with directions to enter a decree in favor of complainant, and that decision of the Appellate Court had been affirmed by the Supreme Court of the state.

Upon the accounting in the Circuit Court the plaintiff in error asked leave to file an amendment to its answer, in which proposed amendment it made the claim that its title was acquired by virtue of an authority exercised by the United States, and that a decree against it would not give full faith, credit and effect to that authority. As the rights of the parties had been theretofore settled by the Appellate Court, and nothing was left to be done but to take an accounting, the court very properly refused to allow the amendment to be made. (Pr. Rec., 502.)

But even if we consider the claim under the Federal decree as having been properly and timely presented in the state court, or as necessarily involved in its decision, there is no ground for the claim that the decree of the state court does not give full faith and credit to the decree of the United States Circuit Court.

POINTS IN SUPPORT OF MOTION.

I.

THE TITLE ACQUIRED UNDER THE FORECLOSURE PROCEEDING IN THE UNITED STATES CIRCUIT COURT IS NOT ATTACKED BY THE BILL NOR DISCREDITED BY THE DECREE. (Brief, p. 14.)

a. The bill merely alleges an agreement and asks that it be enforced.

Pr. Rec., 22.
Ill. Sup. Court (Pr. Rec., 516).

b. The perfecting title by the foreclosure proceeding was part of the agreement.

Id.

c. The decree does not disturb those proceedings, but merely directs a conveyance by the company pursuant to the agreement.

Ill. App. Court (Pr. Rec., 318).
Circuit Court Decree (Pr. Rec., 409).

II.

THE APPLICATION FOR WRIT OF ASSISTANCE PLACED IN ISSUE ONLY THE RIGHT OF POSSESSION OF THE PREMISES AS BETWEEN JULIUS KIRCHOFF AND THE RECEIVER. THE RIGHTS OF THE PARTIES HERETO WERE IN NO MANNER AFFECTED BY THE ORDER ISSUED ON SAID APPLICATION. (Brief, p. 21.)

a. The rights of the parties to this suit could not be determined in the forclosure case for the reason, among

others, that the court had lost all jurisdiction over said cause.

b. The application for the writ put in issue only the possession and not title.

c. Neither of the parties to this case was a party to that proceeding.

d. The order entered on that application is not a bar for the further reason that the purpose of the proceeding was not to settle the title, and the court did not have jurisdiction of either the parties to or subject-matter of this cause.

Aspden v. *Nixon*, 4 How., 467.

III.

THE DEED FROM THE UNITED STATES EXECUTED BY THE COMMISSIONER OF INTERNAL REVENUE OPERATED MERELY AS A RELEASE OF ITS LIEN FOR TAXES UPON THE PREMISES AND NOT AS A TITLE. IT WAS NOT SET UP AS A DEFENSE AND THEREFORE CANNOT NOW BE URGED AGAINST THE DECREE. (Brief, p. 24.)

a. The deed to the government was inoperative as against defendant in error.

Mansfield v. *E. Ref. Co.*, 135 U. S., 326.

b. The deed from the government to plaintiff in error released the lien for taxes and the company was allowed in the accounting the amount it had paid for that release.

Ill. Sup. Court (Pr. Rec., 518).

c. The claim under said deed not having been set up as a defense in apt time was barred.

Ill. Sup. Court (Pr. Rec., 518).
Story's Eq. Plead., Sec 393.
1 Van Fleets' Former Adj., 492.

d. The decision of the Illinois Supreme Court was based as well upon this latter question which relates to rules of practice in the state courts as upon the insufficiency of the deed.

Pr. Rec., 518.

e. This question of practice is not one of a Federal nature.

L. I. W. I. Co. v. *Brooklyn*, 166 U. S., 685.

f. Where the decision of the state court is based upon two grounds, one of which is not of a Federal nature and is sufficient in itself to support the decision, this court has no jurisdiction.

Bacon v. *Texas*, 163 U. S., 207.

IV.

IF IT SHOULD APPEAR THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN THE JUDGMENT OF THE ILLINOIS SUPREME COURT SHOULD BE AFFIRMED UNDER RULE 6 OF THIS COURT AS NEEDING NO FURTHER ARGUMENT. (Brief, p. 28.)

a. Its judgment was clearly in harmony with the decisions of this court.

Peugh v. *Davis*, 96 U. S., 332.
Villa v. *Rodrigue*, 79 U. S., 323.

b. This litigation has been pending for over fifteen years and its further prosecution is for the purpose of delay only.

I.

THE TITLE ACQUIRED UNDER THE FORCLOSURE PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT IS NOT ATTACKED BY THE BILL NOR DISCREDITED BY THE DECREE.

The bill of complaint of defendant in error alleges that after the delivery of her deed said foreclosure proceeding was prosecuted by consent for the purpose of clearing the title to the premises, and that there was an agreement that when the company got its deed from the master it would convey the premises to her. This the defendant (here plaintiff in error) in its answer, denied. The validity of the title derived under the foreclosure proceedings was not called in question. The bill admitted that such a title existed, and the whole controversy rested entirely upon whether there was an agreement for a conveyance by the company to the complainant which she could enforce in a court of equity. The prayer of her bill is not that the decree in the foreclosure proceeding and the conveyance by the master, pursuant thereto be set aside, but that the company be compelled to convey to her. (Pr. Rec., 25.)

Upon reference to the opinion of the Appellate Court (Pr. Rec., 317), it will appear that the court in entering its decree did not attempt to set aside the title acquired by the company under and by virtue of the foreclosure proceeding, but expressly directed the Circuit

Court to take an account and "when the amount due "the company is ascertained to enter a decree that "upon the payment of that amount, with interest "thereon, within ninety days thereafter, the company "convey to her." (Pr. Rec., 318.) The decree of the Circuit Court conforms strictly to this order. (Pr. Rec., 409.)

The Appellate Court found that "the foreclosure pro-"ceedings went on after the conveyances to cut off an "intervening title but with the agreement that it should "not affect the agreement as to the lots described." (Pr. Rec., 318.)

In passing on the contention that the matters embraced in the bill should have been set up as a defense to the foreclosure proceeding, the Illinois Supreme Court said (Pr. Rec., 311): "It is also denied "(claimed) that complainant's failure to assert the al-"leged agreement in the foreclosure proceedings is a "bar to its assertion here, that the proceedings in the "foreclosure are conclusive. We are unable to concur "in this position. It was a part of the arrangement "under which the complainant was to obtain the two "lots in controversy, that a decree of foreclosure "should be entered, and that the premises should be "sold under such decree. The decree was rendered "and the sale made by consent, for the purpose of "clearing different tracts of land mentioned in the quit-"claim deed, from certain encumbrances. The decree "was not adverse to the interest of complainant, but in "harmony with her interest. She is not attacking the "decree but claiming the enforcement of an agreement "under which it was rendered; and in our judgment "there is no ground for holding that the rights of com-

"plainant were cut off or in any manner impaired by "the decree. "

Upon the last hearing before the Illinois Supreme Court on the appeal from the decree entered upon the accounting, this claim was urged and the Supreme Court presented its views as follows:

"It is said the suit is brought to review and set aside "a decree of the United States Circuit Court and the "bill is treated throughout the discussion as hostile "to the foreclosure proceeding in that court, or as at- "tempting to obtain relief properly available in that "action. This is a misapprehension of the scope and "purposes of the complainant's bill. In our former "opinion we said: 'After the settlement had been "concluded it turned out that certain encumbrances "existed against some of the property which were sub- "sequent to the trust deed, but which would take "priority to the quitclaim deed executed by complain- "ant and her husband; it therefore became necessary "in order to obtain a perfect title to go on with the fore- "closure proceedings, which was done.' This state- "ment is based upon an allegation of the bill to the "effect that it being represented to the complainant "by the attorney of the company that it would be nec- "essary to foreclose the trust deed in order to make "good the title in the company to the lots. before they "could take a mortgage thereon for the installments "of redemption money, it was agreed between the parties "that the agreement for redemption should not be exe- "cuted until after the title had been perfected in the "company by foreclosure, but in the meantime the "plaintiff should execute and deliver to the company "her quitclaim deed and should interpose no defense

"to such foreclosure. The allegation was found, in "the opinion above referred to, sustained by proofs "and is conclusive of that fact upon this appeal. The "foreclosure decree in the Federal court was therefore "as much the result of the agreement relied upon by "complainant as was the making of the quitclaim "deed by her. So far from this being an attempt to "review, modify or set aside the decree of the United "States Circuit Court, the right of action is predicated "in part at least upon it; whether the bill be called a "bill to redeem or given another name, can in no way "affect the question of jurisdiction in the state court. "The relief sought is the enforcement of a *contract* to "reconvey the property in question which we have al- "ready held the complainant entitled to." (149 Ill., 539; Pr. Rec., 516.)

As before stated it will be seen by reference to the bill that no attack was made upon the decree of the United States Court, nor was that decree or the deed pusuant thereto set up as a bar to the relief prayed. Referring to the assignment of error upon the appeal from the Appellate Court to the Supreme Court of Illinois, we find no claim that due credit and effect had not been given to the proceeding in the United States Court. (Pr. Rec., 303.) The questions at issue were purely and simply whether or not *as a matter of fact* such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in error was entitled to a conveyance from plaintiff in error; and we fail to see that the plaintiff in error is in any better position, by reason of deriving its title in part under a decree of the United States Court, than it would have been if that title had been

derived by virtue of a patent from the government, or in any other manner. We see no reason why the fact that the title which it holds was derived in part by virtue of an authority exercised under the United States should in any manner absolve the plaintiff in error from the performance of its agreement, or that the enforcement of that agreement in any manner discredits the source of its title.

We had always supposed that a title acquired by such a decree might be disposed of the same as if acquired in any other manner; that it might be leased, mortgaged, sold, conveyed or devised the same as a title acquired by an ordinary deed, and a pre-existing agreement would apply to it in the same manner.

Here it is admitted that the company has the title. It acquired that title in part under the quitclaim deed of Mrs. Kirchoff and in part through the foreslosure proceedings in the United States Court; but in whole pursuant to the agreement that when it should be acquired it would be conveyed to the defendant in error. A bill to enforce that agreement is not one attacking that title.

In *Roby* v. *Colehour*, 146 U. S., 161, Roby while holding the title to certain property in which the Colehours were interested, went into bankruptcy and afterward purchased the property at a sale by his assignee. Some years later the Colehours brought suit against Roby to enforce the recognition of their interest in the property and to set aside a deed from William H. Colehour to Roby. Roby set up his own bankruptcy proceedings and claimed title from his assignee in bankruptcy. The case was decided against him and he appealed to the

Supreme Court of Illinois, which affirmed the decree of the lower court; upon which he prosecuted a writ of error from the Supreme Court of the United States to the state court, upon the ground that a title or right was claimed under an authority exercised under the United States by virtue of the bankruptcy proceedings. A motion was filed to dismiss the writ of error which this court denied but stated that the question was a close one.

The distinction between that case and this is that in that case there was no agreement as to Roby's purchase from his assignee in bankruptcy. If there had been an agreement that when he should have received title from the assignee he would convey to the Colehours and they had filed a bill to enforce that agreement, and the state court should have directed him to convey accordingly, then the case would have been like the one at bar. There it was claimed that he held the title to a part of the premises in trust and that as to that part nothing passed to the assignee in bankruptcy and that consequently the deed from the assignee conveyed no title to that part. Here nothing of the kind is claimed, but on the contrary it is admitted that the foreclosure proceeding and master's deed did clear the property of an intervening title and must be taken in connection with the deed from defendant in error to vest a good title to the premises in the company, and that title when so vested is not attacked, but it is claimed that the company holds it in trust for the defendant in error by virtue of the agreement which is sought to be enforced.

Upon the oral argument in this court on the previous

hearing, his Honor, Justice White, put to counsel for plaintiff in error this very pertinent inquiry: "If "this alleged agreement as claimed by the defend- "ant in error had been reduced to writing, do you say "that its enforcement would then involve a question "of a Federal nature?" To which counsel responded in the negative. But how is the plaintiff in error in a better position before this court than it would have been in if the agreement had been reduced to writing? How does the character of the evidence upon which the agreement is established affect the jurisdiction of the court? The Supreme Court of the State of Illinois has found and stated all the material elements of the contract with as much certainty as if it had been reduced to writing between the parties. That finding is conclusive, and if the enforcement of a written agreement specifically stating the terms of such contract as claimed by the defendant in error in her bill would not involve a Federal question, then none is involved in this case.

We are curious to see whether counsel, in reply to this brief, will adhere to his former opinion that the enforcement of such a written agreement would not envolve a Federal question; or, if he claim the privilege accorded to all wise men, of changing his mind, then we have a like desire to hear the reasons which he will assign for his new faith.

II.

THE APPLICATION FOR WRIT OF ASSISTANCE PLACED IN ISSUE ONLY THE RIGHT OF POSSESSION OF THE PREMISES AS BETWEEN JULIUS KIRCHOFF AND THE RECEIVER. THE RIGHTS OF THE PARTIES HERETO WERE IN NO MANNER AFFECTED BY THE ORDER ISSUED ON SAID APPLICATION.

If it should be contended that the decision of the Federal court upon the application for writ of assistance against the husband of defendant in error is a bar to the present action, it will be remembered that that application was made by the receiver appointed by the court to collect the rents. It was made fourteen months after the entry of the decree in that cause and over a year after the sale by the master. The report of sale had been filed just one year prior to the application and had been confirmed nine months prior thereto. An entire term of court had intervened between the entry of the decree, the sale by the master, and the report of the sale, and the application of the receiver. The master's report of sale was confirmed and the term of court at which that confirmation was made had expired. Under those circumstance we fail to see how the court could have set aside the decree or settled any of the rights of the parties upon the application. It had lost all jurisdiction of the case. It is true it might have refused the writ of assistance but the refusing or the granting of the writ could in no manner be an adjudication of the controversy between the parties to this suit.

The answer of Kirchoff was not filed with any intention of adjudicating in that case the rights of the parties, because unquestionably the court had no jurisdiction at that stage of the proceedings and in that form to pass on those rights. The answer was merely filed and the court asked not to issue the writ for fear that the rights of respondent would be prejudiced by its issuance. That it was not intended to litigate the facts in the case is evident from the answer itself which says that "said Kirchoff further states that his "solicitors have in course of preparation a bill in chan-"cery setting up the foregoing facts and asking that "complainant be required to execute its undertakings "in the premises, or in default thereof that the decree "herein be set aside and held for naught." (Pr. Rec., 107.) It is quite probable that counsel at that time were inclined to the opinion that the proper draft of a bill would be asking the alternative relief as stated in the answer of Kirchoff to the petition; but it is evident that they subsequently concluded that the proper course was to wait until the company received its deed, as the defendant in error had agreed to do, and then ask that it be compelled to carry out its agreement.

The entire scope of the application for writ of assistance was to determine whether Kirchoff or the receiver was entitled to the possession of the premises. On that application the court might very properly say that the defendant in error could get no relief in that case and that the court would not undertake to determine who was in the right, but would by its receiver take possession of the premises itself, leaving her to her proper remedy by the bill which she was about to

file, and in the meantime, the court having possession of the premises neither party could be injured.

But it is sufficient to say that neither of the parties to this case was a party to the application for the writ of assistance; and the decision on that writ was against Julius Kirchoff only and not against defendant in error. (Pr. Rec., 192.) The defendant in error certainly can not be bound by a proceeding to whichshe was not a party.

"A judgment or decree set up as a bar by plea, or "relied on as evidence by way of estoppel, to be conclu-"sive must have been made: 1, by a court of competent "jurisdiction upon the same subject-matter; 2, between "the same parties; 3, for the same purpose."

Aspden v. *Nixon*, 4 How., 467.

If the above rule be applied to the foreclosure proceedings, it will be seen that though they were between the same parties and upon the same subject-matter as the present suit, yet they were prosecuted for an entirely different purpose, namely, to cut off an intervening title; if applied to the application of the receiver for writ of assistance; it will appear that not only did the court have no jurisdiction in that proceeding, at that time, to determine the matters here involved, but neither the parties nor the purpose was the same.

III.

THE DEED FROM THE UNITED STATES EXECUTED BY THE COMMISSIONER OF INTERNAL REVENUE OPERATED MERELY AS A RELEASE OF ITS LIEN FOR TAXES UPON THE PREMISES AND NOT AS A TITLE. IT WAS NOT SET UP AS A DEFENSE AND THEREFORE CANNOT NOW BE URGED AGAINST THE DECREE.

As before stated, in 1871, while the premises were owned by defendant in error and occupied by the firm of Julius Kirchoff & Co., for a distillery, the premises were seized and sold by the United States because of failure of the distilling company to pay certain revenue taxes. The sale and deed were to the United States who conveyed all its interest to the plaintiff in error on September 10, 1884.

This deed was not set up by the plaintiff in error as a defense, but it appeared upon the accounting taken in the Circuit Court that such conveyance had been made and that the plaintiff in error had paid to the United States the sum of $500 for a conveyance and in the accounting that amount was allowed plaintiff in error, together with interest from the date of payment. (Pr. Rec., 504.)

The plaintiff in error urged in the state court and we presume it will also be urged here, that the effect of the decree is to deprive it of this alleged title from the United States. No attack has been made upon that title nor was any defense made under it. The pleadings make no mention of it whatever. But it was claimed by the defendant in error that it operated as a release of the lien for taxes upon the premises

held by the United States and for that reason it was proper that the plaintiff in error should be reimbursed the amount which it had paid for such release. In this contention the state courts concurred.

It is necessary, in order to ascertain the extent of the interest or claim conveyed by the internal revenue commissioner, that we inquire into *the nature of the proceedings* and in furtherance of this inquiry we would respectfully refer the court to the case of *Mansfield* v. *Excelsior Refining Co.*,135 U. S., 326, for a full and lucid discussion of the *identical* question involved. That case was appealed from the United States Circuit Court for the Northern district of Illinois, and the principal point at issue was the title acquired through the United States by virtue of a seizure in all respects identical with that in the present case. In that case this court held that by virtue of the revenue laws the United States acquired a first lien for revenue taxes upon the premises upon which the distillery was located; that this lien, *as against the owner* of the premises, *could be foreclosed only in a court of equity* and that the seizure and sale by the collector of internal revenue served to pass only the leasehold interest of the distilling company in the premises, and did not in any manner affect the title of the owner. Under the law therefore, the deed by the collector of internal revenue to the United States could and did pass only the interest of the distilling company of J. Kirchoff & Co. It expressly appears by the testimony of Kirchoff and, in fact, it is admitted by stipulation, that Mrs. Kirchoff was not a member of that distilling firm. (Pr. Rec., 498.) Therefore, as she was owner of the premises, her interest therein was

not affected in any manner by said deed to the United States government. It was wholly inoperative, except as affecting the interest of the firm which as to the land was nothing.

But the United States yet retained its lien upon the premises for the balance of the revenue taxes still remaining unsatisfied and in conveying all its interest to plaintiff in error, who was at the time of such conveyance a mortgagee in possession of the premises, it will be held to have released to plaintiff in error its lien upon the premises. For this release the company paid the sum of five hundred dollars ($500), and in the accounting that amount together with interest thereon from the date of payment was allowed it. The United States retained its lien, not by virtue of that sale but because it had never been released until the insurance company, a mortgagee in possession of the premises, canceled the obligation by the payment of $500.

"The taxes were a paramount lien to all others and "when paid by any lien holder he was of course sub-"rogated to the rights of the state (United States) for "the amount necessarily paid to extinguish the lien for "taxes."

Pratt v. *Pratt*, 96 Ill., 194.

But there is another reason why the plaintiff in error cannot complain that it is being deprived of this alleged title to the premises. The deed from the United States to the plaintiff in error was executed on September 15, 1884, nearly three years before the original decree was entered in the Circuit Court. Subsequent to the acquisition of said deed, the complainant filed an

amended bill in this case, to which the defendant had the right to file an answer and interpose as a defense to the relief prayed, its so-called independant title by virtue of said deed from the government; or the defendant could by a cross-bill or supplemental answer have interposed that defense, and it was its duty to do so, if it sought to make any claim thereunder.

Story's Eq. Plead., Sec. 393.
1 Van Fleet's Former Adj., 492.

The bill filed in this case was broad enough to warrant the court in entering a decree divesting the defendant of any title or interest which it may have had or claimed in the premises. It prayed that the defendant might be required to convey to the complainant the two lots in question. The Appellate Court directed the Circuit Court to enter a decree in accordance with said prayer, which was done. It cannot now complain that it has been deprived of a defense which it might have set up to this proceeding in the Circuit Court.

But the decision of the Supreme Court of Illinois is based as well upon the ground that the title under this deed from the United States was not presented as a defense in apt time to be available to the plaintiff in error as upon the ground that that deed did not effect the interest of Elizabeth Kirchoff in the premises.

Where there are two grounds for the judgment of a state court only one of which involves a Federal question and the other is broad enough to maintain the judgment sought to be reviewed, this court will not look into the Federal question.

Bacon v. *Texas*, 163 U. S., 207.

This decision by the Illinois Supreme Court that the deed from the government was not set up in time to avail the plaintiff in error as a defense, involved only a question of practice in the courts of Illinois and not a Federal question. As to questions of practice the decisions of the state court are not subject to review by this court.

Long Island Water Supply Co. v. *Brooklyn*
166 U. S., 685.

The decision of the state court on this question was clearly in harmony with established rules of practice in courts of chancery.

Story on Equity Pleadings, 393.
1 Van Fleet's Former Adj., 492.

IV.

IF IT SHOULD APPEAR THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN THE JUDGMENT OF THE ILLINOIS SUPREME COURT SHOULD BE AFFIRMED UNDER RULE 6 OF THIS COURT, AS NEEDING NO FURTHER ARGUMENT.

This case has been pending for over fifteen years. It has been twice to the Appellate Court of the State of Illinois, three times to the state Supreme Court and twice to this court. It has been argued both orally and by printed briefs. No less than eighteen printed briefs and five petitions for rehearing have been filed in the courts of appellate jurisdiction. It would seem that the object of plaintiff in error is to protract the litigation to the greatest extent possible.

It appears that the possibilities of procuring delay by bringing the case to this court did not occur to it until after the rights of the parties had been finally settled against it by the state Supreme Court, for then for the first time it sought to introduce the claim of a Federal question into the proceedings.

The judgment of the state Supreme Court to which the first writ of error was prosecuted from this court was rendered on June 12, 1890 (Pr. Rec., 305), and that writ of error was taken on June 10, 1892 (Pr. Rec., 316), it lacking only two days of two years from the date of judgment.

The last decision by the Supreme Court of Illinois was rendered on March 31, 1894 (Pr. Rec., 515), and this writ of error was taken on March 27, 1896 (Pr. Rec., 519) only four days prior to the expiration of two years from said judgment.

The case was argued both orally and by printed briefs in this court at the October term, 1895, and all questions subject to review by this court having been presented on these motions we think the case needs no further argument. It is clear according to the authorities of this court as well as of the Supreme Court of Illinois that the parties having made the agreement as found by the Illinois Supreme Court, it was proper for the state court to decree its enforcement whether a Federal question was involved or not. These parties bore the relation of mortgagor and mortgagee and it was intended by the agreement that that relation as to the premises in question should not be changed.

The defendant in error owes the plaintiff in error a sum of money and the plaintiff in error holds the title

to certain property which it was intended by both parties should belong to the defendant in error and should secure the plaintiff in error the amount of its claim. To that extent the relation of the parties is that of mortgagor and mortgagee.

The statute of the State of Illinois (Chap. 95, Sec. 12) provides that "every deed conveying real estate which "shall appear to have been intended only as a security "in the nature of a mortgage, though it be an absolute "conveyance in terms, shall be considered as a mort-"gage." This statute has been in force in the State of Illinois in its present form for the last fifty years, and is only declaratory of the well settled rule applicable to courts of equity and always followed by the courts of that state.

This court has recognized the same rule in no uncertain terms. In *Peugh* v. *Davis*, 96 U. S., 332, the court said:

"It is an established doctrine that a court of equity "will treat a deed absolute in form as a mortgage when "it is executed as security for a loan of money. That "court looks beyond the terms of the instrument to the "real transaction, and when that is shown to be one "of security and not of sale, it will give effect to the "actual contract of the parties. As the equity upon "which the court acts in such cases arises from the "real character of the transaction, any evidence, writ-"ten or oral, tending to show this is admissible."

Again in *Villa* v. *Rodrigue*, 79 U. S., 323, it is said:

"The law upon the subject of the right to redeem "where the mortgagor has conveyed to the mortgagee "the equity of redemption is well settled. It is char-

"acterized by a jealous and salutary policy. Prin-
"ciples almost as stern are applied as those which
"govern where a sale by *cestui que trust* to his trustee
"is drawn in question. To give validity to such a sale
"by a mortgagor it must be shown that the conduct of
"the mortgagee was, in all things frank and fair, and
"that he paid for the property what it was worth. He
"must hold out no delusive hopes; he must exercise
"no undue influence; he must take no advantage of
"the fears or poverty of the other party. Any indirec-
"tion or obliquity of conduct is fatal to his title. Every
"doubt will be resolved against him. Where confiden-
"tial relations and the means of oppression exist, the
"scrutiny is severer than in cases of a different charac-
"ter. *The form of the instruments employed is im-*
"*material.* That the mortgagor knowingly surrendered
"and never intended to reclaim is of no consequence.
"If there is vice in the transaction, the law, while it
"will secure to the mortgagee his debt with interest,
"will compel him to give back that which he has taken
"with unclean hands. Public policy, sound morals
"and the protection due to those whose property is
"thus involved require that such should be the law."

The general rule is stated by Pomeroy as follows:

"Whenever a person acquires the legal title to lands
"by means of a verbal promise to hold them for a cer-
"tain specified purpose, as for example, a promise to
"convey them to a designated individual or to reconvey
"them to the grantor and the like; and having thus
"obtained the title, fraudulently retains, uses and
"claims the lands as absolutely his own so that the
" whole transaction by means of which the owner-
"ship was obtained is based upon deceit and is in fact

"a scheme of actual fraud, such party is regarded as "holding the lands charged with an implied trust aris- "ing from his fraud and he will be compelled by a "court of equity to execute this trust by performing his "agreement and by conveying the estate in accordance "with his promise."

Pomeroy on Specific Performance, 144.

Authorities might be multiplied indefinitely, but it would be useless to cite them as the rule is too well settled.

Assuming then that the agreement was made as alleged and as found by the state courts it is quite evident that the defendant in error was entitled to the relief granted.

Respectfully submitted.

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